Supreme Court, U.S.
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No. 04-

IN THE

# Supreme Court of the United States

HAL VOZNICK,

*Petitioner,*

*v.*

SHURFLO, INC., A CALIFORNIA CORPORATION,

*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT, THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, AND THE CALIFORNIA SUPERIOR COURT FOR THE COUNTY OF ORANGE*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a state court, by denying an employee fair procedure as required by law, is a "state actor" that has violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

## PARTIES TO THE PROCEEDING

Petitioner is Hal Voznick (Voznick). Respondent is Shurflo, Inc., a California corporation (Shurflo).

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## PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice, William H. Rehnquist, and Associate Justices of the United States Supreme Court. Petitioner, Hal Voznick, respectfully petitions for a writ of certiorari to review, reverse and remand the judgment, decisions, rulings, and orders of the California Supreme Court, the California Court of Appeal, Fourth Appellate District, Division Three and the Superior Court for the County of Orange, State of California.

## OPINIONS BELOW

The decisions, rulings, judgment and orders of the California Superior Court for the County of Orange, State of California, the California Court of Appeal Fourth Appellate

District, Division Three and the California Supreme Court are reported in Petitioner's appendices 1 through 4 appended to the within writ of certiorari.[1]

## JURISDICTION

The opinion and judgment of the California Supreme Court was entered on June 9, 2004. The jurisdiction of the court rests on Title 28 U.S.C. § 1257. The jurisdiction of this court is invoked under the Fifth and Fourteenth Amendments of the United States Constitution and Title 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth and Fourteenth Amendments to the United States Constitution.

2. The decisions, rulings and judgments entered by the lower state courts constitute a violation of Petitioner's fundamental rights to procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution. The failure of that state's highest reviewing court to enforce common law due process standards against the employer and Respondent, Shurflo, Inc., is a violation of Petitioner's rights to be afforded with constitutional due process.

3. As a general proposition, the Supreme Court will not review any state court judgment unless a federal law question is presented (and has been raised below), even if the state judges allegedly erred in applying their state's law.

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[1] The appendix to this writ petition includes: the judgment of dismissal entered on October 1, 2002, by the California Superior Court for the County of Orange (appendix 1), the opinion filed by the California Court of Appeal, Fourth Appellate District, Division Three, on March 18, 2004 (appendix 2), and its denial of a petition for rehearing, filed April 19, 2004 (appendix 3). The denial of the petition for review by the California Supreme Court is included in appendix 4, June 9, 2004

*Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 618-38 (1875). The lone exception is where a state court decision rests on an interpretation of state law that blocks consideration of a federal issue. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 375 (2002) (asserting appellate jurisdiction where the state court had relied upon a state procedural rule that effectively deprived a criminal defendant of his due process rights); *see also Davis v. Wechsler*, 263 U.S. 22 (1923).

In this case, respondent violated state law – failing to provide fair procedures before discharging a private-sector employee who had a contract with a "just cause" provision as articulated in the case of *Cotran v. Rollins Hudig Hall Int'l*, 17 Cal.4th 93 (1998). Here, the California Supreme Court affirmed the decisions of the lower court and in so doing violated Voznick's rights under the Fifth and Fourteenth Amendment to the United States Constitution.

This case presents the **extraordinary** facts where the lower state courts' interpretation and application of state laws is so patently incorrect that it amounts to a violation of Voznick's rights under the Due Process Clause of the Fifth and Fourteenth Amendments. The key issue is that Shurflo is not a state actor, but a private company. State judges generally do not become "state actors" for Fifth and Fourteenth Amendment purposes merely by adjudicating cases between private parties involving state law. Nonetheless, as judges are governmental employees, their conduct can give rise to a federal constitutional claim such as that presented in this case.

## I. The State Action Doctrine

Section 1 of the Fourteenth Amendment (binding on to the states through the Fifth Amendment) to the U.S. Constitution provides that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law." This Amendment has always been construed as limited to actions by a "state," not a private party. In the seminal *Civil Rights Cases*, 109 U.S. 3

(1883), the Court invalidated provisions of the Federal Civil Rights Act of 1875 prohibiting racial discrimination in public accommodations. *Id.* at 8-26. The Court reasoned that, as Section 1 applied only where a state government or its agencies had deprived blacks of their rights or authorized others to do so, Congress's Section 5 power to enforce Section 1 was similarly restricted. Accordingly, Congress could not reach discrimination by private parties acting on their own (e.g., operators of hotels, theaters, and railroads). *Id.* at 9-19, 23-26.

Several Justices on the Warren Court suggested that Congress could regulate conduct by private persons that, if taken by a state, would have amounted to Fourteenth Amendment violations, *e.g.*, *United States v. Guest*, 383 U.S. 745 (1966). Nonetheless, this Court has repudiated this view. *See United States v. Morrison*, 529 U.S. 598, 619-27 (2000) (holding that Congress could not create a federal cause of action for a victim of gender-motivated violence committed by a private party without any state action).

This case involves the more direct question of whether the state has violated the Due Process Clause. This issue, in turn, depends on whether there is a state actor in the first instance. There are only two possible candidates: Shurflo or the California courts. The California courts are state "actors" for purposes of the Constitution's Due Process Clause.

Nonetheless, some cases have found state action where a court orders private individuals to do something that, if done by the state itself, would violate the Fourteenth Amendment, *e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that a court order that would enforce a racially restrictive covenant in a real estate contract by enjoining a white property owner from selling to black buyers would violate the Fourteenth Amendment). *Shelley* establishes that judges can be state actors whose judgments in favor of purely private parties (there, a homeowner) can nonetheless violate Fourteenth Amendment rights. Shelley establishes that the California

courts have ordered the private employer, Shurflo, to **violate the Due Process Clause**.

Courts next determine "whether the private party charged with the [constitutional] deprivation could be described in all fairness as a state actor" in light of all the facts and circumstances regarding his connections with the government. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

The last consideration is "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Edmonson*, 500 U.S. at 622 (citing *Shelley*). The Court in *Edmonson* held that **the harm of racial discrimination in jury selection was exacerbated by the fact that the government allowed it to occur in a courtroom, where people expect equal justice to be dispensed**. *Id.* at 628.

## II. In This Writ Petition, the California Courts Must be Considered State Actors

As mentioned above, *Shelley v. Kraemer*, 334 U.S. 1 (1948), establishes that judges can be state actors provided they order private parties to take actions that would run afoul of the Fourteenth Amendment if done directly by the court (or other state officials). Although the California courts here did not order Shurflo to violate the Due Process Clause, its judgment has the effect of putting the state's **stamp of approval** on Shurflo's denial of Voznick's rights to fair procedure under state law. The language of *Shelley* is applicable to this case:

> The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for

> [334 U.S. 1, 20] want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. **We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy.**[2] Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. **State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms**. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands. (*Id.* at 18)

A more recent case indicates that state courts that take official action are subject to Fourteenth Amendment constraints. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), involved a Mississippi Chancery Court ruling that a father (S.L.J.) and his second wife had met their statutory burden of proving, by "clear and convincing evidence," that all parental rights of the natural mother (M.L.B.) to her two minor children should be terminated forever. *Id.* at 107-08. The Mississippi appellate courts rejected M.L.B.'s timely appeal solely because she could not afford to pre-pay record preparation fees, as required by state law. *Id.* at 106, 108-09. The U.S. Supreme Court reversed, holding that the Due Process and Equal Protection Clauses prohibited a state from so conditioning an appeal when an important family association like a parent-

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[2] *Bridges* v. *California*, 314 U.S 252 (1941); *Am. Fed'n of Labor* v. *Swing*, 312 U.S. 321.

child bond (as contrasted with a mere property interest) was at stake. *Id.* at 106-07, 110-28.[3] Of special pertinence here, the Court declared:

> Although the termination proceeding in this case was initiated by private parties . . . rather than by a state agency, the challenged state action remains essentially the same: M.L.B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships. *Id.* at 116 n.8.[4]

The M.L.B. case reaffirms that judges can be state actors.

## STATEMENT

On March 16, 2001, Voznick filed an action against his former employer, Shurflo, stemming from his wrongful termination of employment without good cause.

During 1991, Voznick entered into an oral employment agreement with Shurflo in which it agreed to hire Voznick and not to terminate the employment contract except for "good cause." The vice president of engineering, negotiated the employment agreement (limited by the good cause

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[3] The Court stressed that, unlike with private business disputes that required paying a court (e.g., fees to secure a bankruptcy discharge) but that might have been resolved through alternative means, termination of fundamental family relationships (e.g., divorce and parental rights) require access to the State's judiciary. *Id.* at 114-15.

[4] The Court also quoted with apparent approval the mother's argument that "'where the State's judicial processes are invoked to secure so severe an alteration of a litigant's fundamental rights . . . basic notions of [constitutional] fairness [and] equal protection . . . require that a person be afforded the right of appellate review though one is unable to pay the costs of such review in advance." *Id.* at 109; *see also id.* at 118-20 (to similar effect). This quote indicates that a state's courts (i.e., the "judicial process") can violate the Fourteenth Amendment. Again, however, the Court elsewhere emphasized that such process is required to terminate family relationships. (*Id.* at 115).

discharge provision) with Voznick on behalf of Shurflo. Voznick's Shurflo employment was not at the "will" of its senior management's unfettered, arbitrary and capricious discretion in the formulation of discharge decisions. Shurflo did not have the "unfettered" discretion to terminate the employment agreement in the absence of "good cause."

On summary judgment, the trial court and the California Court of Appeal expressly held that there were no triable issues of material fact, concluded that "good cause" existed[5] to terminate Voznick and granted summary judgment to Shurflo. These judgments, decisions and rulings were, in turn, confirmed by the California Supreme Court that denied Voznick's petition for review.

Most importantly, these decisions and opinions relegated California's common law procedural due process restraints on Shurflo's "corporate conduct" to ashes which was then rubberstamped, **without comment**, by the reviewing courts.

This wrongful discharge action arises from a series of unsolicited telephone calls placed by an unknown, unreliable and untested "informant" who was not an employee of Shurflo (a water pump manufacturer). These events occurred between January 22 to 25, 2001, and ultimately lead to Voznick's termination without cause on January 29, 2001. Prior to these telephone calls, Voznick had been a Shurflo ten-year career professional, a mechanical engineer, water market manager and recognized nationally as one of its top producers. Voznick's reputation for integrity and honesty was beyond question and he had an unblemished record and was continuously rewarded for his work for Shurflo.

The informant accused Voznick of dishonesty, theft, conducting business for another company, covering up Shurflo labels on its products and shipping them to the Far

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[5] Ignored the fact that Voznick was not afforded state common law due process during the pre-termination investigation.

East. The accusations spread quickly through Shurflo management, and undermined its confidence and trust in Voznick. Rather than paying the informant $5,000 for more details as demanded, Shurflo **retaliated** and discharged Voznick within a few days of the initial contact.

The president of Shurflo opined that the **informant's accusations were not the grounds** for Voznick's discharge Yet, Shurflo's senior management was so influenced and prejudiced by the informant's tantalizing stories, that it substituted this hoax for sound managerial judgment in formulating its discharge decision. What followed was a **classic case of railroading and post hoc rationalization**.

Voznick was first approached by his supervisor, Hardesty, and accused of participating in the matter, and of lowering pump prices to assist his father in a water filter business, Vertex.[6]

Vertex assembles and markets residential water filter systems. Shurflo manufactures pumps for the beverage, industrial and recreational vehicle markets. There is no conflict of interest. Vertex purchased water filter systems from Aquamaster (an independent distributor of Shurflo products) that are not marketed by Shurflo.

There is no evidence to prove that Voznick was employed by Vertex and/or that he received any benefits from Vertex. Voznick discovered after termination by Shurflo that Vertex had acquired an insignificant quantity of pumps from

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[6] Vertex does not have any subsidiaries, is not controlled by holding corporations and is staffed with less than five employees. Its stock is privately held and presently has a marginal value, if any. Shurflo is controlled by a multi-national conglomerate, staffed by hundreds of employees, and its stock is publicly traded. Shurflo's profit centers are further divided into a complex hierarchy of regional and district marketing and distribution functions that report to the most of its senior management. Shurflo's operating profits run into the hundreds of millions of dollars on an annual basis. Shurflo and Vertex do not compete in the same market as their product lines are completely diverse.

Aquamaster at domestic market prices (not reduced Asian market prices).

At the time Hardesty confronted Voznick, Hardesty had actual knowledge that there was no evidence of stolen inventory. Yet, he elected not to disclose this fact to Voznick. Hardesty used the uproar created by the informant's hoax, to terminate Voznick's career. He engineered Voznick's discharge in such a way as to cause maximum harm.

**The president of Shurflo accepted the reports offered by Hardesty, and rubberstamped the termination recommendations** while playing golf in the City of Industry, State of California. The investigation charade, conducted by Hardesty, failed to disclose Voznick's exculpatory statements and lead directly to the termination decision. The exculpatory statements offered to Hardesty clearly rebut and impeach the content of his reports to management and raise triable issues of fact. The court of appeal and California Supreme Court refused to consider Voznick's version of Hardesty's reports.[7]

The Hardesty memorandum, ignores exculpatory evidence offered by Voznick during their meetings (as

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[7] The Hardesty pre-termination reports relayed to Shurflo's president for rubberstamp approval consisted of the following: (1) The career ending and uncorroborated accusations made by the informant; (2) Parading Voznick "in and out" of the offices of senior management; (3) A cursory one-half hour meeting between Hardesty and Voznick; and, (4) A summary of the comments received from management staff. This charade of common law due process: (1) Failed to provide Voznick with a detailed presentation of the accusations; (2) Failed to afford Voznick with an opportunity to preserve, in written form (or, any other mode for the preservation of audible conversation), his responses and exculpatory statements; (3) Placed Hardesty, Voznick's immediate supervisor, in the position of fact finder instead of appointing the "neutral and detached" vice president of human resources to conduct the interview; (4) Failed to permit Voznick to obtain witness statements; (5) Failed to obtain a written statement from the informant; and, (6) Failed to provide Voznick with copies of Shurflo's written disciplinary practices, policies and directives and did nothing to verify the "alleged" facts garnered during any of the meetings.

described in the summary judgment opposition), and for good reason. To Hardesty, **Voznick's termination was a foregone conclusion.**

A reasonable juror, presented with the evidence in this case, could conclude that Shurflo's purported justification for Voznick's discharge, conflict of interest, and making of false statements to management were offered in bad faith, and reasonably could conclude that Voznick was in fact terminated unlawfully as Shurflo violated Voznick's rights to common law procedural due process at the investigation stage. A reasonable jury could conclude Voznick's termination was in retaliation of the fabricated career-ending accusations made by the informant.

The trial court, court of appeal, and California Supreme Court simply accepted Shurflo's argument that Voznick's employment should be terminated, and ruled that such termination was proper as a matter of law. Voznick respectfully suggests these courts committed manifest error; and requests that this matter be remanded for trial. As demonstrated herein, the duplicity of the state courts in stamping their approval on the serious and egregious violations of Voznick's common law right to procedural due process constitutes a violation of his rights to due process under the Fifth and Fourteenth Amendments.

There is little doubt that the trend at both the state and federal levels is towards the constitutionalization of the common law doctrine of procedural due process for private sector workers employed pursuant to a contract that requires a good cause finding prior to termination. In California, the seminal case of *Cotran v. Rollins Hudig Hall*, 24 Cal. 4th 93 (1998), has created a landslide of appellate litigation to secure Fifth and Fourteenth Amendment procedural due process rights for private sector employees.[8] Public sector employees

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[8] *Cozza* v. *Notrhrop Grummon Corp.*, 41 F. Supp. 2d 1089 (9th Cir. 1999) cites to: *Cotran* v. *Rollins Hudig Hall Int'l*, 17 Cal 4th 93 (1998), for

have enjoyed procedural due process protections for more than one-half century. The artificial distinction between private and public employees in terms of constitutional due process has far outlived its relevance and must give way to the realities of the twenty-first century. Employees in the private sector suffer the same tragic socio-economic losses as their counterparts in the public sector upon termination.

The rationale in *Cotran* has spread to the federal district trial, appellate courts and sister states. *Cotran* makes it clear that Voznick was not only deprived of his common law right to a fair procedure[9], but the courts of this state deprived him of his rights pursuant to the Fifth and Fourteenth Amendments by their failure to enforce the common law right to a thorough pre-termination investigation that follows adequate notice of the dischargeable offenses, and an opportunity to respond.

At the core of Voznick's opposition to Shurflo's summary judgment motion is cogent proof that Shurflo breached the express oral employment agreement, which limited termination to good cause only, by orchestrating his

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the proposition: "a reasoned conclusion [to terminate the employment contract] supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct, and a chance for the employee to respond." (*Id.* at 1095)

*Bilbo* v. *Dyncorp*, 55 Fed. Appx. 416 (2003) (unpublished). Cites *Cotran* for unrelated issues.

*Sparkes* v. *Bicycle Club Casino*, 2000 U.S. App. LEXIS 16745 (9th Cir. 2000) (unreported). Cites *Cotran* for the proposition the employer must have grounds to believe termination is proper. (*Id.* at 646.)

*Sandberg* v. *State Farm Mutual Auto. Ins. Co.*, 1999 U.S. App. LEXIS 24246 (unreported). "Good cause means a fair and honest reason, regulated by good faith that is not trivial, arbitrary or capricious, unrelated to business needs or goals or pretextual." (*Id.* at p. 1000, internal quotes and footnotes deleted.)

[9] Adequate notice and opportunity to be heard during the pre-termination process.

termination without good or any cause. Further, Shurflo breached the agreement by failing to conduct an adequate and fair investigation, failed to accurately report the Hardesty interviews with Voznick and failed to preserve the exculpatory statements offered by Voznick. Thus, Voznick was not only deprived of his right to common law due process, but most importantly, by stamping their approval on management's conduct, the reviewing courts denied Voznick of the constitutionally guaranteed right to procedural due process. The reasons disclosed by Shurflo for the termination were making misrepresentations to Tom Hardesty and conflict of interest. Voznick's termination was pretextual, to mask the real reasons for management's discharge decisions, the "tips" received from the informant. Hardesty was so consumed by the informant's accusations, that Voznick had committed dischargeable acts, that all reason collapsed in his "pre-termination investigation" reports to Shurflo's senior management. The informant's accusations, relayed to Hardesty by the director of customer service, suggest that it was a foregone conclusion that Voznick would be terminated due to management's unquestioned wholesale acceptance of Hardesty's reports. The reports were accepted, without question by senior management. Yet, the pre-termination reports failed to afford Voznick with an ounce of common law due process as Hardesty completely turned his back on Voznick's exculpatory statements.

The centerpiece of Shurflo's summary judgment motion included memoranda prepared by McLean and Hardesty relating to the tips received from the informant. The discharge decision was so expedited by Hardesty that Voznick was terminated within three days after the initial interview. **Shurflo's president rubberstamped Hardesty's recommendation and in so doing, abdicated his responsibilities under *Cotran*.** Voznick's career and socio-economic structure built over a period of ten years completely collapsed. Shurflo's failure to provide even the minimum of

common law due process is intolerable and a violation of the U.S. Constitution.

Hardesty, who led the charge to discharge Voznick, was so compelled to destroy Voznick's reputation and career, he failed to conduct a reasonable and fair investigation within the meaning of *Cotran*. **Hardesty made the unilateral decision to avoid obtaining a written statement from Voznick to preserve his version of the facts**, then failed to disclose Voznick's exculpatory statements to senior management. This reprehensible and outrageous conduct not only violated Voznick's right to common law due process, but the refusal by the reviewing courts to reverse the trial court's decision constitutes state action within the meaning of the Fifth and Fourteenth Amendments.

In *Cotran*,[10] the employee was discharged following the receipt of a complaint by the employer that he had engaged in several acts of sexual misconduct with two female employees. The exhaustive *Cotran* investigation included the following: Separate interviews of the female employees were held by the employer's human resources department to preserve their statements. The employees executed interview statements that were sent to the employer's director of equal employment opportunity (EEO) for review. The employer's president arranged for a meeting with the appellant, attended by the EEO director and the EEO compliance manager. The president then disclosed the contents of the complaints to the employee and advised that an investigation would take place. The EEO director explained how the complaints would be processed. The employee offered no explanation for the complaints and was suspended pending completion of the investigation. The manager of EEO interviewed **twenty-one**

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[10] During 1996, the California Court of Appeal handed down its decision in the seminal wrongful employment discharge decision in *Cotran* v. *Rollins Hudig Hall Int'l*, 17 Cal.4th 93 (1998). Since the date of publication, the opinion in that case has been cited and formed the underpinnings of both federal and state cases and related authorities.

**people including five the employee had asked to be interviewed, over a two-week period**. The president received a report from EEO with affidavits that concluded it was more likely than not that the dischargeable acts had occurred. Appellant was then terminated and filed a wrongful termination case.

In *Cotran*, the California Supreme Court set forth the elements of the defense to a wrongful termination case:

**(1) Whether the employer acted in good faith in deciding to terminate.** "Good cause" in the context of implied employment agreements means fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual (*Id.* at 107-108).

**(2) Whether the decision followed an adequate investigation**. The employer must listen to both sides ". . . always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial for review." (*Id.* at 108.) (Common law procedural due process.)

**(3) Whether the employer had reasonable grounds for believing the charges against the employees were true.**

> On retrial, the jury should be instructed . . . that the question critical to defendant's liability is not whether plaintiff in fact sexually harassed other employees, but whether at the time the decision to terminate his employment was made, **defendants acting in good faith and following an investigation that was appropriate under the circumstances had reasonable grounds for believing plaintiff had done so**. (Emphasis added.) (*Id.* at 109)

The concurring opinion of Justice Mosk states (*Cotran*, 17 Cal.4th at 110):

> [T]he requirement that an employee receive **notice and an opportunity to be heard is not fulfilled by a charade of due process by an employer that has already made up its mind, but rather signifies adequate notice of the charges and a reasonable opportunity to respond . . . [F]air procedure requires that the employee have a truly meaningful opportunity to tell his or her side of the story and to influence the employer's decision.** (Emphasis added.)

The pre-termination investigation that Shurflo subjected Voznick can best be described as a due process charade. Shurflo's idea of fair process involved forcing Voznick into an interview without any prior explanation of the objective of the "investigation." **On the date Hardesty confronted Voznick, it was a foregone conclusion that Voznick would be terminated. Hardesty failed to provide Voznick with a list of the alleged dischargeable acts; nor did he explain Shurflo's policies and procedures relating to the investigation. Most importantly, Hardesty failed to afford Voznick with the opportunity to prepare a written statement to preserve his version of the facts.** Instead, Hardesty seized the opportunity to relay to senior management only those facts he saw fit to disclose. Voznick's rights to common law procedural due process was clearly trampled.

Hardesty's reports to senior management were sanitized of the exculpatory statements offered by Voznick.[11] The

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[11] United States Supreme Court Citations: *Pabst* v. *Safeway, Inc.*, Sup. Ct. 9-3-98, Cal. LEXIS 6389 (Cal. Sept. 30, 1988, and *Mooney* v. *Sim J. Harris Co.*, Sup. Ct. Minute 9-3-08, 1998 Cal. LEXIS 6388 (Cal. Sept. 30, 1998).

Federal Cases: *Hanekamp* v. *McKesson Corp.* 203 U.S. Dist. LEXIS 9859 (9th Cir. 2003) (unreported); *Desimore* v. *Allstate*, 1999 U.S. Dist. LEXIS 1999 (9th Cir. 1999) (unreported) ("Good cause" for purpose of terminating employment requires the presence of reasons that are not trivial, capricious, unrelated to business needs or pretextual); *Cerda* v.

investigation and management review techniques implemented by the employer in *Cotran* were extensive and designed to afford the employee the maximum opportunity to influence the employer's termination decision. **Refusing to preserve Voznick's exculpatory statements and merely parading him around for view by each member of the management staff is an intolerable method of investigation.** Shurflo clearly placed its own profit motives ahead of Voznick's right to common law procedural due process.

## REASONS FOR GRANTING THE PETITION

### I. Common Law Fair Hearing and Procedural Due Process in Public and Private Sectors

The California appellate opinions, constitute compelling evidence of the evolution of the common law procedural due

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*McDonnell Douglas Corp.* 1999 U.S. App. LEXIS 38282 (9th Cir. 1999) (Substantial evidence of employee misconduct lead to discharge. Employee discharged. Termination based on report from Army that employee was an embarrassment to the U.S. Army and to NATO forces. Based on this report, employer, a defense contractor, was not required to conduct independent investigation.); *Baido* v. *Tidewater Ins. Co.*, 153 F. Supp. 2d. 1108, 2000 U.S. Dist. LEXIS 21546 (9th Cir. 2004); *Cotran* v. *Rollins Hudig Hall Int'l, Inc.*, 17 Cal 4th 93, 107-108 (1998); *Adrid* v. *AT&T*, 1998 U.S. Dist. Lexis 12851 (9th Cir. 1998) (The employer must prove objective that misconduct occurred.); *Cozza* v. *Northrop Grumman Corp.*, 41 F.Supp.2d 1085 199 U.S. Dist. LEXIS 2885 (9th Cir. 1999) (Employee afforded ample time to respond to charges.); *Mingo* v. *Delta Airlines* 1998 U.S. Dist. LEXIS 6022 (9th Cir. 1998); *DeLeonardes v. Credit Agricole Idosuez* 2004 U.S. LEXIS 16506 (2nd Cir. 2000) (unreported); *Burlington Motor Carriers, Inc.* v. *APL, Ltd.*, 1999 U.S. Dist. 20819 (unreported); *Chravala* v. *Borden, Inc.*, 14 F.Supp.2d 1013 (6th Cir. 1998); *Dominicum Mgmt. Servs.* v. *Nationwide Hous. Group*, 3 F.Supp.2d 1054 (8th Cir. 1998) (unreported) and *Erskine* v. *Boeing*, 2002 U.S. Dist. LEXIS 21819 (11th Cir. 2002) (unreported).

State Cases: *Gaudio* v. *Griffin Health Servs. Corp.*, 249 Conn. 523, 733 A2d 197 (Conn Sup. Ct.); *Petersen* v. *N.D. Univ. Sys.*, 2004 N.D.2, 678 N.W.2d 163 (N.Dak. Sup. Ct., 2004); *Guz* v. *Bechtel Nat., Inc.*, 24 Cal.4th 317 (2000); *Marriage of Leonard*, 119 C.A.4th 549 (Cal. Sup. Ct. 2004).

process doctrine that was first applied to regulate contracts between public sector hospitals and private sector physicians, and the professional relationships between private sector hospitals and private sector physicians. This evolution has been nothing less than remarkable. Traditionally, state courts refused the invitation to intervene in employment contract disputes between public sector hospitals and **private** sector medical health care providers. These disputes included processing applications to grant staff privileges to private sector physicians, and disciplinary functions of their governing bodies.

In the last century, substantial inroads were made by the California courts, in both public and **private sector** employment disputes, requiring hospitals to afford staff physicians in both public and private sector employment settings with procedural due process. Courts mandated notice and the right to a fair hearing, reasonable opportunity to be heard and an opportunity to respond before adverse personnel decisions were executed.[12]

Borrowing language from the United States Constitution's Fifth and Fourteenth Amendments[13] and the holdings in a long line of state court opinions, the California Court of Appeal in the case of *Ascherman v. San Francisco Medical Society*[14] reigned in the enormous and otherwise unchecked power held by the employer's governing body to ride roughshod over a worker.

*Ascherman* recognizes the inherently unequal bargaining power inherent in the employer/employee relationship.

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[12] This is a substantive rule of law in the State of California.

[13] The Supreme Court has held that an employment contract is a fundamental right and a property interest protected by the Constitution's Due Process Clauses. *Brock* v. *Roadway Exp. Inc.*, 481 U.S. 252, 260-261 (1987).

[14] 39 Cal. App. 3d 623 (1974)

Although the case is thirty years old, the opinion is even more viable today than in 1974. Modern society measures gross national product in terms of mathematical formulas, dollars, cents, percentages and excludes all measurement for human suffering attributable to unfettered personnel policies and practices of multinational Fortune 500 corporate aggregates. These conglomerates thrive off the toil of their employees and turn daily sales profits into hundreds of millions of dollars. The profound impact on the individual worker, due to intolerable personnel practices of many conglomerates ranges from loss of income, bankruptcy, loss of the family unit; to the worker's inability to obtain suitable replacement employment.

In *Ascherman,* the California Court of Appeal articulated the fundamental public policy considerations for introducing both common law and constitutional procedural due process constraints into the arbitrary and capricious actions of a private sector employer, to preserve a worker's right to influence the employer's personnel policies and practices. Specifically, the *Ascherman* court confirmed an employee's right to a fair hearing and an opportunity to be heard.

In *Ezekial v. Winkley*, 20 Cal.3d 267 (1977), the California Supreme Court held:

> [W]e consider whether a surgical resident in a private teaching hospital must be accorded notice of charges and an opportunity to respond, pursuant to the common law right of fair procedure prior to dismissal from the residency program. **We conclude that fair procedure principles are applicable to the facts pleaded herein**." (*Id.* at 269-270) (Emphasis added.)
>
> Plaintiff contends that the circumstances of his dismissal do not comport with common law rights of fair procedure, the origins of which can be traced to our opinion in *James v. Marinship Corp.* (1944) 25 Cal.2d 721, 731. In *Marinship*, we held that a labor union, because of its ability to exclude all nonmembers from

> employment in a particular trade, assumed legal responsibilities beyond those which were applicable to other private organizations such as social clubs. We concluded that the union's possession of this power entitled applicants for membership, under the common law, to judicial protection against arbitrary exclusion on the basis of race. (*Ibid.*) Since *Marinship*, California courts, in a variety of circumstances, have recognized the effect which exclusion from membership in a private organization exerts upon a person's right to pursue a particular profession or calling. Thus, subsequent California decisions have not only expanded judicial review of labor union membership policies, but also have applied the *Marinship* principle to the admission practices of professional societies, membership in which is a practical prerequisite to pursuit of a medical or dental specialty, and to access by practicing physicians to staff privileges in private hospitals. (Internal quotes and citations omitted.)

The *Ezekial* court also held: "[T]here is no reason why the fact of a continuing scrutiny of a physician's competence and progress in a residency program should bar application of **fair procedure principles**." (*Id.* at 277.) (Internal quotes and citations omitted; emphasis added.)

In *Ambrosino v. Metropolitan Life Ins. Co.*, 899 F. Supp 438 (1995) (unreported), the court found that employers that required membership in labor unions and professional and trade associations occupied such a monopoly in certain employment categories, that for an individual to make a living in those professions, membership in those private associations was a necessity. The court held: "[M]embership in Defendant's network of participating physicians is subject to the common law right to fair procedures" as "managed care providers control substantial economic interests." *(Id.* at 445) (Internal quotes and citations omitted). The court added that prior to the 20th century, procedural fairness had been an established part of California common law. *(Id.* at 553.)

In *Piezak v. Glendale*, 112 F.Supp.3d 990 (9th Cir. 2000), the district trial court, in citing *Ezekial v. Winkley*, 20 Cal.3d 267 (1977) with approval, held that a physician was entitled to a fair pre-termination hearing although the employer was a private sector hospital.

In *Almada v. Allstate Ins.* Co., 153 F.Supp.2d 1108, (D. Ariz., 2000), the court adopted the *Cotran* reasonable and good faith standard, stating that before an employee is terminated, the employer must have "actual proof of the employee's guilt", that a good-faith belief of misconduct is insufficient. *Id.* at 1114.

## II. The *Cotran/Silva* Pre-Termination Investigations.

The following state and federal opinions have underscored the substantial procedures employers have implemented to ensure adequate and fair pre-termination investigations.

1. *Cotran v. Rolling Hudig Hall Int'l, Inc.*, 17 Cal.4th 93 (1998): In *Cotran*, the employee was discharged following the receipt of a complaint that he had engaged in several acts of sexual misconduct with two female employees. The *Cotran* investigation included: separate interviews of the female employees held by the employer's human resources department. The complaining employees executed interview statements and were interviewed separately to preserve their accusations. The statements were sent to the employer's director of equal employment opportunity (EEO) for review. The employer's president met with the appellant, the EEO director and the EEO compliance manager and then disclosed the contents of the complaints and advised that an investigation would take place. The EEO director explained how the complaints would be processed. The employee offered no explanation for the complaints and was suspended pending completion of the investigation. The manager of EEO interviewed twenty-one people including five the employee had asked to be interviewed, over a two-week period. The president received a report from EEO with affidavits that

concluded it was more likely than not that the dischargeable acts had occurred. Appellant was then terminated and he filed a wrongful termination case.

2. *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256 (1998): In *Silva*, the employee was discharged by Lucky Stores for having sexually harassed female co-workers. (*Id.* at 265):

During the ensuing investigation, the human resource representative interviewed **fifteen Lucky Store employees** regarding the allegations against Silva. He recorded each interview and obtained a written statement from each witness.

3. In *Cozza v. Northrop Grumman*, 41 F. Supp. 2d 1089 (9th Cir. 1999), the court found that the employer performed a nearly **four-month** investigation that included an audit of purchase orders, deposition of management employees, and legal investigation into the alleged misconduct. *Id.* at 1091.

4. In *Jones v. Costco Wholesale Corp.*, 34 Fed. Appx. 230 (9th Cir. 2002), the employer investigated sexual harassment allegations by interviewing approximately seventeen employees, managers and supervisors. Interviewed twice, Jones also prepared two written statements attaching declarations from other employees. As a result of findings, Jones was terminated. The court found the investigation adequate per *Cotran,* as it gathered substantial evidence, included notice of the alleged misconduct to the employee, and provided the employee with the opportunity to respond.

5. *Cerda v. McDonnell Douglass Corp.*, 1999 U.S. App. LEXIS 38282 (9th Cir. 1999) (unreported): The employer gathered substantial evidence of misconduct through fourteen memorialized interviews. The court deemed such investigation to be adequate. *Id.* at 2.

6. In *Townsell v. McDonnell Douglas Corp.*, 216 F.3d 1084 (9th Cir. 2000), Townsell had accumulated several complaints against him in the months preceding his termination.

April 10 – an argument with a union steward was followed up with an interview with Townsell and others. June 10 – Townsell met with HR personnel regarding his improper interactions; he was issued a warning that further inappropriate behavior could lead to termination. June 19 – HR interviewed an employee who complained about Townsell's rumor spreading; Townsell submitted a statement presenting his side of the story. The employer placed Townsell on leave until a decision could be reached. June 25 – Townsell signed an action plan with HR acknowledging that his job was in jeopardy if his performance did not improve. July 8 – a union steward accused Townsell of threatening her; during the HR interview, Townsell denied the threat. July 12 – finding the steward more credible than Townsell, he was terminated. The court found the investigation adequate according to common law due process.

**III. The Fourteenth Amendment and Common Law Procedural Due Process Laws Make No Economic, Social or Political Distinction in the Work Force. An Inadequate Pre-Termination Investigation Performed by the Employer Leads to Unconscionable Results to Employees Whether They Are in the Public or the Private Sector.**

A. In *Board of Regents v. Roth,* 408 U.S. 564 (1972), the court held that procedural due process requirements apply only to the protection of liberty and property as encompassed in the Fourteenth Amendment. The court ruled that when a deprivation of these interests is threatened, "it is fundamental" that a person must have the opportunity for some kind of hearing, unless there is an "extraordinary situation" where governmental interests justifies the postponement of such a hearing. The court held that due process requires that prior to the termination of protected interests, that the State must afford "notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 570.

The *Roth* court held that to find whether due process requirements apply, the court must determine if the nature of

the interest at stake is within the protection of liberty and property under the Fourteenth Amendment. *Id* at 570. Due process procedures are designed to secure a person's interest in specific benefits that he has already acquired. *Id.* at 576.

The court held that the employee's prospects for re-employment were of major concern to the employee. The court held that to have a property interest in a benefit a person must have a legitimate claim of entitlement to it, not merely a desire or expectation. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* at 577. The court concluded by stating that the opportunity for a person to vindicate his claims is a constitutional right. *Id.* at 577.

> In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a privilege, not a right, and that procedural due process guarantees therefore were inapplicable. [Citations omitted.] The basis of this holding has been thoroughly undermined in the ensuing years. For, as Mr. Justice Blackmun wrote for the Court only last year, this Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.' *Id* at 570.

The *Roth* court found that the purpose of notice and hearing is to provide the employee with the opportunity to clear his name, reputation, honor or integrity. The court agreed that if an employee's name had been cleared, the employer may deny him future employment for other reasons. *Id.* at 573.

B. In the landmark decision *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, (1985), the Court held:

> All the process that is due is provided by a pre-termination opportunity to respond, coupled with post termination administrative procedures as provided by the

Ohio statute; **since respondents alleged that they had no chance to respond**, the district court erred in dismissing their complaints for failure to state a claim. Pp. 1491-1496. (a) The Ohio statute plainly supports the conclusion that respondents possess property rights in continued employment. The Due Process Clause provides that the substantive rights of life, liberty, and property cannot be deprived **except pursuant to constitutionally adequate** procedures. The categories of substance and procedure are distinct. Property cannot be defined by the procedures provided for its deprivation. Pp. 1491-1493. (b) The principle that under the Due Process Clause an individual must be given an opportunity for a hearing *before* he is deprived of any significant property interest, requires **some kind of hearing prior to the discharge of an employee** who has a constitutionally protected property interest in his employment. **The need for some form of pre-termination hearing is evident** from a balancing of the competing interests at stake: the private interest in retaining employment, the governmental interests in expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the **risk of an erroneous termination**. Pp. 1493-1495. (c) The pre-termination hearing need not definitively resolve the propriety of the discharge, but should be an initial check against mistaken decisions-- essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. **The essential requirements of due process are notice and an opportunity to respond**. Pp. 1495-1496." (*Id.* at 1491-1496.) (Emphasis added.)

**[A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays**. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions;

and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. **An employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard** in (*id.* at 545) keeping the employee on the job, it can avoid the problem by suspending with pay. *Id.* at 544. (Emphasis added)

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a **fundamental due process requirement**. See *Friendly, Some Kind of Hearing*, 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and **an opportunity to present his side of the story**. See *Arnett v. Kennedy*, 416 U.S., at 170- 171, 94 S.Ct., at 1652-1653 (opinion of Powell, J.), 94 S.Ct., at 1664-1665 (opinion of White, J.). (*Id.* at 546.) (Emphasis added.)

Because the Court suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off . . . (*Id.* at 548.)

To my mind, the disruption caused by a loss of wages may be so **devastating** to an employee that, whenever there are substantial disputes about the evidence, additional pre-deprivation procedures are necessary to minimize the risk of an erroneous termination. That is, I place significantly greater weight than does the Court on the public employee's substantial

interest in the accuracy of the pre-termination proceeding. **After wage termination, the employee often must wait months before his case is finally resolved**, during which time he is without wages from his public employment. By limiting the procedures due prior to termination of wages, the Court accepts an impermissibly high risk that a wrongfully discharged employee will be subjected to this often lengthy wait for vindication, and to the attendant and often traumatic disruptions to his personal and economic life. (*Id.* at 549.) (Emphasis added.)

Considerable amounts of time may pass between the termination of wages and the decision in a post-termination evidentiary hearing . . . During this period the employee is left in limbo, deprived of his livelihood and of wages on which he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered, either because of the nature of the charges against him, or because of the prospect that he will return to his prior public employment if permitted. **Similarly, his access to unemployment benefits might seriously be constrained, because many States deny unemployment compensation to workers discharged for cause**. Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments. He would be forced to spend his savings, if he had any, and to convert his possessions to (*id.* at 550) cash before becoming eligible for public assistance. (*Id.* at 549) (Emphasis added.)

[T]he substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because

of a wrongful discharge from tenured Government employment cannot be so easily discounted. *Id.* at 550.)

**Of perhaps equal concern, the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation, and the loss of an opportunity to perform work, will never be recompensed, and indeed probably could not be with dollars alone**. (*Id.* at 550.) (Emphasis added)

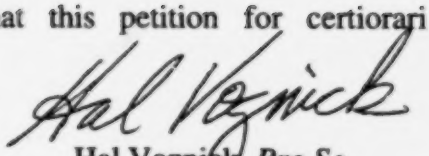
That these disruptions might fall upon a justifiably discharged employee is unfortunate; that they might fall upon a wrongfully discharged employee is simply unacceptable. Yet in requiring only that the employee have an opportunity to respond before his wages are cut off, without affording him any meaningful chance to present a defense, the Court is willing to accept an impermissibly high risk of error with respect to a deprivation that is substantial." (*Id.* at 551.)

The opinion for the Court does not confront this reality. I cannot and will not close my eyes today – as I could not 10 years ago – to the economic situation of great numbers of public employees, and to the potentially traumatic effect of a wrongful discharge on a working person. Given that so very much is at stake, I am unable to accept the Court's narrow view of the process due to a public employee before his wages are terminated, and before he begins the long wait for a public agency to issue a final decision in his case. (*Id* at 551.)

## CONCLUSION

There are simply no rationale or logical bright line distinctions that can be drawn to compare the adverse consequences sustained by a public sector or private sector employee when the discharge decision is based on an impermissible deprivation of due process. Voznick

respectfully requests that this petition for certiorari be granted.



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